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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~1028.~~ 678 134

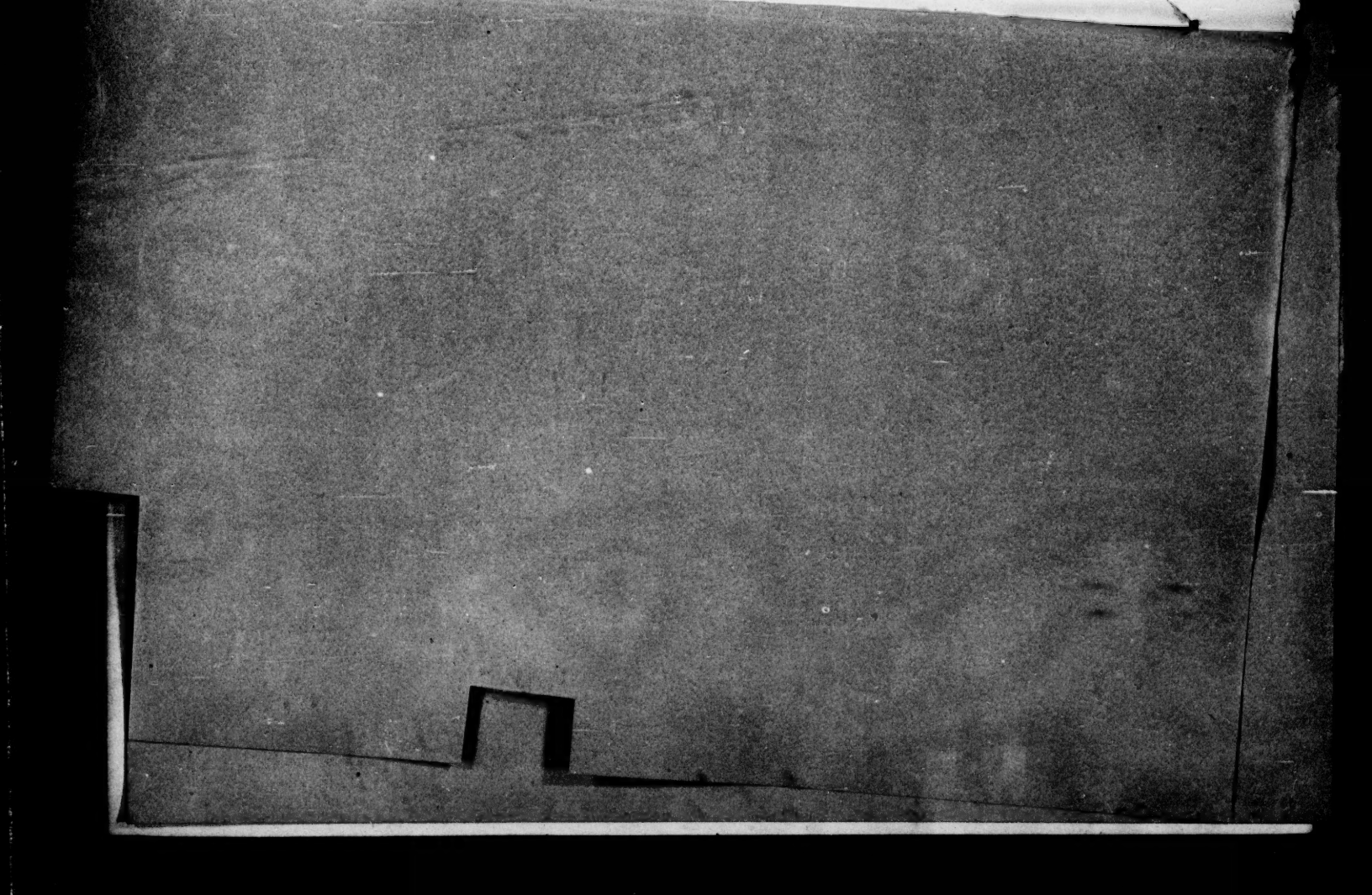
HIRAM BARNEY, LATE COLLECTOR, &c., PLAINTIFF IN ERROR,

vs.

JOHN W. COX, SUCCESSOR TO AND SURVIVING PARTNER OF VICTOR BARSALEW.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED DECEMBER 2, 1878.



SUPREME COURT OF THE UNITED STATES.

No. 1028.

HIRAM BARNEY, LATE COLLECTOR, &c., PLAINTIFF IN ERROR,

vs.

JOHN W. COX, SUCCESSOR TO AND SURVIVING PARTNER OF VICTOR BARSALEW.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the southern district of New York, greeting:

Because in the records and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court before you, between John W. Cox, successor to and surviving partner of Victor Barsalew, plaintiff, and Hiram Barney, defendant, a manifest error hath happened, to the great damage of the said Hiram Barney, as by his complaint appears, we being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday of October, eighteen hundred and seventy-eight, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done thereon to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 25th day of July, in the year of our Lord one thousand eight hundred and seventy-eight.

[SEAL.] JOHN I. DAVENPORT,
Clerk.

The foregoing writ is hereby allowed.

SAM'L BLATCHFORD.

2 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, John I. Davenport, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error and in obedience thereto, do hereby certify that the following pages, numbered from three to twenty-five inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of Hiram Barney, plaintiff in error, against John W. Cox, successor to and surviving partner of Victor Barsalew, defendant in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed at the city of New York, in the southern district of New York, in the second circuit, this 28 day of September, in the year of our Lord one thousand eight hundred and seventy-eight, and of the Independence of the said United States the one hundred and third.

[SEAL.] JOHN I. DAVENPORT,
Clerk.

(Indorsed:) U. S. Supreme Court. Hiram Barney, plaintiff in error, against John W. Cox, successor to and surviving partner of Victor Barsalew, defendant in error. Writ of error. Stewart L. Woodford, att'y for pl'ff in error.

I hereby admit due service of a copy of the within.

ALMON W. GRISWOLD,
Att'y for Def't in Error.

1878. July 26, '78

U. S. Circuit court. Filed July 26, 1878. John I. Davenport clerk.

3 U. S. circuit court.

JOHN W. COX, SUCCESSOR TO AND SURVIVING partner of Victor Barsalon,
vs.
HIRAM BARNEY.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

The above-named plaintiffs come here into court, and by A. W. Griswold, their attorney, suggest and give the court now here to understand and be informed that heretofore, to wit, on the 16th day of April, 1868, last past, an action was commenced in the superior court of the city of New York, according to the laws of the State of New York, and the rules and practice of said court, in such case made and provided, in favor and in the name of the said plaintiffs against the defendant herein, upon and for the same cause of action hereinafter set forth, and the summons therein was filed in the clerk's office of the said superior court. That the defendant afterwards, by his attorney, duly appeared in said action, and such proceedings were thereupon had that afterwards, and on the 5th day of May, in the year of our Lord one thousand
4 eight hundred and sixty-eight, the said action was in due form of law removed by writ of certiorari for further prosecution and trial into this court, according to the act of Congress in such case made and provided; and the clerk of the said superior court did thereupon return the said writ with the summons aforesaid, and did file the same in this court, according to the course and practice of this court, which allegations and suggestions the defendant does not deny, but admits the same to be true.

Wherefore let the further proceedings and trial in this action against the defendant be continued in this court.

And the plaintiffs accordingly, by their attorney aforesaid, complain of the defendant herein in a plea of trespass on the case.

For that whereas the said defendant, on the 16th day of April, one thousand eight hundred and sixty-eight, at the city of New York, in the southern district aforesaid, was indebted to the said plaintiffs in the sum of two thousand dollars, lawful money of the United States of America, for money before that time lent
5 and advanced by the said plaintiffs to the said defendant and at the special instance and request of said defendant; and for other money by the said plaintiffs before that time paid, laid out, and expended for the said defendant, and at the request of the said defendant; and for other money by the said defendant before that time had and received to and for the use of the said plaintiffs. And being so indebted, the said defendant in consideration thereof afterwards, to wit, on the same day and year, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the said sum of money in this count mentioned when the defendant should be thereunto afterwards requested.

And whereas also the said defendant afterwards, to wit, on the same day and year, and at the place aforesaid accounted, together with the said plaintiffs, of and concerning divers other sums of money before that time due and owing from the said defendant to the said plaintiffs, and then and there being in arrear and unpaid, and upon such accounting the said defendant then and there was found to be in arrear and
6 indebted to the said plaintiffs in the further sum of two thousand dollars of lawful money as aforesaid. And being so found in

arrear and indebted to the said plaintiffs the said defendant in the consideration thereof afterwards, to wit, on the same day and year, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the said sum of money last mentioned, when the said defendant should be thereunto afterwards requested.

Nevertheless the said defendant (although often requested, &c.) has not yet paid the said several sums of money above mentioned, or any or either of them, or any part thereof to the said plaintiffs, but to pay the same or any part thereof to the said plaintiffs the said defendant has hitherto wholly refused, and still does refuse, to the damage of the said plaintiffs of two thousand dollars, and thereof the plaintiffs bring suit, &c.

A. W. GRISWOLD,
Attorney for Plaintiffs.

And the said defendant, by the U. S. district attorney, his attorney comes and defends the wrong and injury, &c., and says that he
7 did not undertake and promise in manner and form as the said plaintiff has above thereof declared against him, and of this he puts himself upon the country, &c. And the said parties having stipulated in writing to refer the issue to the Hon. John I. Davenport as referee, and said referee having heard the respective parties and made his report, filed October 12th, 1876, in the office of the clerk of this court, by which he found in favor of the plaintiffs for the sum of eleven hundred and thirty-one & $\frac{68}{100}$ dollars in gold and silver coin, paid as and for duties, as of October 12th, 1876. And the said parties having stipulated in writing to waive trial by jury, and to submit the case to be passed upon by the court without a jury, and the case having been accordingly submitted to the honorable Samuel Blatchford, district judge, he, on the 13th day of October, 1876, did find for the plaintiffs in the sum of eleven hundred and thirty-one & $\frac{68}{100}$ dollars on charges and commissions as of October 12th, 1876, over and above their costs and charges by them in this behalf expended, and for those costs and charges now here adjudged, the sum of one hundred and fourteen & $\frac{82}{100}$ dollars.

8 Therefore it is considered that the said plaintiffs recover against said defendant their damages and costs aforesaid, amounting together to the sum of twelve hundred and forty-six & $\frac{50}{100}$ dollars.

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114 82

$1,246 50

Judgment signed this 14th day of October, 1876.

J. M. DEUEL,
Dep. Clerk.

(Endorsed:) U. S. circuit court. John W. Cox, successor to & surviving partner of Victor Barsolau, vs. Hiram Barney. Judgment roll. A. W. Griswold, pl'ff's att'y. Filed Oct. 14, 1876.

9 U. S. circuit court, southern district of New York.

Benjamin H. Hutton, survivor, &c., *vs.* Lucretia Bronson, executrix. O. S. 331. Com. July 23, '55.

Carl L. Recknagel et al. *vs.* Hiram Barney. O. S. 2357. Com. M'ch 10, '64.

Benjamin Babcock et al. *vs.* Heman J. Redfield. O. S. 350. Com. Nov. 1, '59.

Frederick A. Spies et al. *vs.* Heman J. Redfield. O. S. 308. Com. Nov. 1, '59.

A. B. Thiriott *vs.* Heman J. Redfield. O. S. 554. Com. Oct. 1, '60.

Bernard Andreæ et al. *vs.* Heman J. Redfield. O. S. 547. Com. Sep. 21, '60.

Francis A. Hirsch *vs.* Hiram Barney. O. S. 2016. Com. Jan'y 30, '64.

Henry H. Munsell et al. *vs.* Heman J. Redfield. O. S. 387. Com. Dec. 23, '59.

Henry Fischer et al. *vs.* Hiram Barney. O. S. 1956. Com. Jan'y 12, '64.

Gustavus Bunge et al. *vs.* Hiram Barney. O. S. 1188. Com. May 6, '63.

Henry Mairet et al. *vs.* Hiram Barney O. S. 1959. Com. Jan. 12, '64.

Eugene Dutilh et al. *vs.* Hiram Barney. O. S. 1193. Com. May, 6, '63.

Thomas B. Merrick et al. *vs.* Hiram Barney. O. S. 1198. Com. May 6, '63.

Peter Balen *vs.* Augustus Schell. O. S. 623. Com. May 1, '61.

10 Ernest Caylus et al. *vs.* Hiram Barney O. S. 1540 Com. Oct. 23, '63.

Frederick W. Simonds et al. *vs.* Hiram Barney. O. S. 2356. Com. Mc'h 10, '64.

Curtis B. Raymond et al. *vs.* Augustus Schell. O. S. 2614. Com. May 7, '64.

Ernest Caylus et al. *vs.* Augustus Schell. O. S. 615. Com. Ap'l 13, '61.

Henry A. Richard *vs.* Augustus Schell. O. S. 627. Com. May 18, '61.

Carl L. Recknagel et al. *vs.* Augustus Schell. O. S. 506. Com. Sep. 1, '60.

Thomas Galway et al. *vs.* Augustus Schell. O. S. 407. Com. Feb. 24, '60.

William Brugiere et al. *vs.* Augustus Schell. O. S. 422. Com. M'ch 1, '60.

John W. Cox, successor, &c., *vs.* Hiram Barney. N. S. 389. Com. Ap'l 16, '68.

Otto W. Pollitz et al. *vs.* Augustus Schell. O. S. 458. Com. May 22, '60.

William C. Pickersgill et al. *vs.* Hiram Barney. O. S. 1202. Com. May 6, '63.

J. Robinson *vs.* Augustus Schell. O. S. 82. Com. Jan'y 29, '59.

H. A. Vatable et al. *vs.* Augustus Schell. O. S. 94. Com M'ch 17, '59.

Emile Heinemann et al. *vs.* Augustus Schell. O. S. 384. Com. Dec. 14, '59.

Emanuel Giro et al. *vs.* Augustus Schell. O. S. 610. Com. M'ch 20, '61.

Firmin Cousinery et al. *vs.* Augustus Schell. O. S. 614. Com. Ap'l 13, '61.

11 Peter C. Blancan et al. *vs.* Augustus Schell. O. S. 492. Com. July 21, '60.

F. Y. Breithaupt et al. *vs.* Augustus Schell. O. S. 580. Com. Nov. 21, '60.

L. Herckenrath et al. *vs.* Augustus Schell. O. S. 588. Com. Jan'y 8, '61.

Frederick Grund et al. *vs.* Augustus Schell. O. S. 601. Com. Feb. 23, '61.

Daniel S. Draper et al. *vs.* Augustus Schell. O. S. 609. Com. M'ch 11, '61.

James P. Dike et al. *vs.* Hiram Barney. O. S. . Com. May 6, '63.

Walter Bauendahl et al. *vs.* Augustus Schell. O. S. 1237. Com. May 21, '63.

Conrad Poppenhusen et al. *vs.* Hiram Barney. O. S. 1447. Com. Aug. 26, '63.

Raphael M. Gomez et al. *vs.* Augustus Schell. O. S. 617. Com. Ap'l 13, '61.

Henry A. Richard *vs.* Hiram Barney. O. S. 716. Com. M'ch 8, '62.

Nathan Gifford et al. *vs.* Hiram Barney. O. S. 1206. Com. May 6, '63.

David Wallenstein et al. *vs.* Hiram Barney. O. S. 1194. Com. May 6, '63.

J. Ferdinand Kedenberg *vs.* Hiram Barney. O. S. 1197. Com. May 6, '63.

Ludwig Marx et al. *vs.* Hiram Barney. O. S. 1958. Com. Jan'y 12, '64.

Theodore Ralli et al. *vs.* Hiram Barney. O. S. 2358. Com. M'ch 10, '64.

Louis Engelhorn et al. *vs.* Hiram Barney. O. S. 2362. Com. M'ch 10, '64.

12 Charles W. Ruprecht et al. *vs.* Hiram Barney. O. S. 1459. Com. Oct. 13, '63.

John F. Schepeler et al. *vs.* Hiram Barney. O. S. 1789. Com. Dec. 8, '63.

Frederick Spring *vs.* Hiram Barney. O. S. 1791. Com. Dec. 8, '63.

J. Pierrepont Morgan et al. *vs.* Hiram Barney. O. S. 1957. Com. Jan'y 12, '64.

David V. Freeman *vs.* Hiram Barney. N. S. 393. Com. Ap'l 16, '68.

Henry Hennequinn et al. *vs.* Hiram Barney. N. S. 396. Com. Ap'l 16, '68.

Charles Peirson et al., surviving partner, &c., *vs.* Hiram Barney. N. S. 400. Com. Ap'l 16, '68.

Emile Heinemann et al. *vs.* Hiram Barney. O. S. 2360. Com. M'ch 10, '64.

Louis Oppenheim et al. *vs.* Hiram Barney. O. S. 2359. Com. M'ch 10, '64.

Moncrief Mitchell et al. *vs.* Augustus Schell. O. S. 619. Com. Ap'l 13, '61.

Henry Bender et al. *vs.* Hiram Barney. N. S. 391. Com. Ap'l 16, '68.

Wm. H. Cashman et al. *vs.* Hiram Barney. N. S. 394. Com. Ap'l 16, '68.

Frederick M. Peyser *vs.* Hiram Barney. N. S. 401. Com. Ap'l 16, '68.

13 On reading and filing the stipulation on behalf of the respective parties to the above entitled actions, now pending in this court, to recover duties alleged to have been illegally exacted upon charges and commissions; it appearing to the court that the assessment of the damages in each of the said several causes will require the examination of long accounts and of numerous invoices, entries, and other documents

and papers, and the taking of the testimony of various witnesses touching the same:

Now, on motion of A. W. Griswold, of counsel for the said several plaintiffs, George Bliss, esquire, counsel for said several defendants, appearing and not objecting thereto,

It is ordered by the said court now here that the said several causes be, and they are hereby, referred to John I. Davenport, esquire, as sole referee, to take proofs of and ascertain the claim of the plaintiff or plaintiffs in each of the said several causes, with interest, for excess of duties upon such charges and commissions, which may be found to have been illegally exacted from plaintiffs and paid under protest to defendants
14 and not barred by the statute of limitation, whenever the same has been pleaded, upon importations at the port of New York, specified in the several bills of particulars served, or to be served, in said several causes.

The said referee shall proceed to determine and adjust the claims of the said several plaintiffs in accordance with the rules and decisions of this court in similar cases so far as the same shall be found applicable to the said causes herein above named.

And it is further ordered that said referee state and report the amounts ascertained by him on said several commissions and charges separately, and the facts found by him in respect thereto and in respect to the protests touching the same. The said referee shall give notice to the attorneys of the respective parties of the time and place of hearing therein, unless such notice shall be waived by said attorneys, and that either party may, on the hearing before said referee, raise objections and exceptions, and the referee shall decide thereon, and either party
15 may bring such objections and exceptions to a hearing before the court after the report of such referee shall be filed, and for that purpose may require the referee to report the evidence or testimony taken in the case upon which the objection or exception arises in such manner as the court shall direct, and copies of the protests filed therein respectively.

That said referee shall report on such cases with all convenient dispatch, and on the coming in of such report and the decision of such exceptions as may be taken thereto by either party, either party shall be at liberty to move for judgment or verdict for the amount, as to the court shall seem meet.

And it is further ordered that the compensation of said referee shall be determined by the court, after the coming in of his said reports, at such amount as shall appear to such court to be just and proper.

Dated December 4th, 1874.

(Signed) SAM'L BLATCHFORD.

U. S. circuit court, southern district of New York.

It is stipulated and agreed that the order hereto annexed be
16 entered, by and with the consent and direction of the court, in each of the above-entitled causes (fifty-nine in all), and that upon the entry of such order the said several causes stand referred to John I. Davenport, esquire, for the purposes and in the manner specified in said order.

Dated November 13, 1874.

ALMON W. GRISWOLD,
Att'y for Plaintiffs in each of said causes.
GEORGE BLISS,
Att'y for Defendant in each of said causes.

(Endorsed:) U. S. circuit court, southern district of N. Y. Benjamin H. Hutton, survivor, &c., ag'st Lucretia Bronson, executrix, &c., & 58 other cases. Consent & order reference. A. W. Griswold, pl'ffs' att'y in each of said causes. Filed Dec. 4, 1874.

17 Circuit court of the United States for the southern district of New York.

JOHN W. COX, SUCCESSOR TO & SURVIVING partner of Victor Barsalon,
vs.
HIRAM BARNEY.

In pursuance of an order made in the above-entitled cause on the 4th day of December, in the year one thousand eight hundred and seventy-four, by which, among other things, it was referred to the undersigned to adjust the amount, if anything, for which the plaintiffs are entitled to a verdict in the cause, and to report thereon to this court with all convenient speed:

Now, I, John I. Davenport, to whom the matter was referred, do report that I have been attended by the counsel for the respective parties, and have taken and examined the testimony offered in support of the plaintiffs' claim, and do find that upon the importations specified in the plaintiffs' bill of particulars in the case, the said plaintiffs paid to the defendant, as collector of the port of New York, as and for duties
18 on charges and commissions on said importations in excess of the amount required by law, the sum of five hundred and ninety-two & $\frac{60}{100}$ dollars in gold and silver coin, or in Treasury notes issued under the authority of the United States, and that said duties were illegally exacted by the defendant from and paid by said plaintiffs to said defendants, under protest duly made by the said plaintiffs in writing; and I do find that the plaintiffs are entitled to a verdict for said sum of five hundred ninety-two & $\frac{60}{100}$ dollars, as and for duties, and to interest on said sum from the date of its payment to the date of this, my report, amounting to five hundred and thirty-nine & $\frac{08}{100}$ and thirty-one & $\frac{68}{100}$ dollars, and that a statement of the said amounts so paid by the said plaintiffs to the said defendant as and for duties on charges, and as and for duties on commissions, together with the interest due thereon, forming part of this my report, is on file in the office of the collector of the port at New York.

All of which is respectfully submitted.

Dated New York, Oct. 12th, 1876.

JOHN I. DAVENPORT,
Referee.

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19 (Endorsed:) U. S. circuit court, southern district of New York. John W. Cox, successor to & surviving partner of Victor Barsalon, vs. Hiram Barney. Referee's report. John I. Davenport, referee. Filed Oct. 12th, 1876.

20 U. S. circuit court, southern district of New York.

JOHN W. COX, SUCCESSOR TO AND SURVIVING partner of Victor Barsalon,
vs.
HIRAM BARNEY.

The parties to the above entitled action hereby waive trial by jury, and stipulate to submit the case to be passed upon by the court without a jury.

Dated Oct. 13th, 1876.

GEORGE BLISS,
Att'y for Defendant.
ALMON W. GRISWOLD,
Att'y for Plaintiff.

21 U. S. circuit court, southern district of New York.

JOHN W. COX, SUCCESSOR TO AND SURVIVING partner of Victor Barsalon,
ag'st
HIRAM BARNEY.

On reading the report of the referee in the above-entitled action, dated October 12th, 1876, and filed in the office of the clerk of this court;

And on reading and filing consent of counsel for the respective parties waiving trial by jury, and stipulating to submit the case to be passed upon by the court without a jury, I find for the plaintiff in the above entitled cause for the sum of eleven hundred and thirty-one & $\frac{68}{100}$ dollars in gold and silver coin, paid under protest, as and for duties overpaid on charges and commissions as of October 12th, 1876.

(Signed) SAM'L BLATCHFORD.

Dated October 13th, 1876.

(Endorsed:) U. S. circuit court, southern district of N. Y. John W. Cox, successor to & surviving partner of Victor Barsalon, vs. Hiram Barney. Consent and finding of court. A. W. Griswold, pl'ffs' att'y. Filed Oct. 14th, 1876.

22 United States circuit court, southern district of New York.

JOHN W. COX, SUCCESSOR, &C.,
vs.
HIRAM BARNEY. } N. S. 389.

At a stated term of the circuit court of the United States for the southern district of New York, held in the court-room, in the city of New York, on the 9th day of February, 1878.

Present, Hon. Samuel Blatchford, judge.

On reading and filing the consent, hereto annexed, of Almon W. Griswold, attorney for pl'ffs, and Stewart L. Woodford, U. S. attorney, attorney for defendant in this action, it is ordered that a certificate be entered in the above entitled action that the money for which the judgment was recovered herein was exacted by the defendant herein, or was paid to him, and was by him paid into the Treasury in the performance of his official duty as collector of the port of New York; and that he acted under the directions of the Secretary of the Treasury.

And it is further ordered that said certificate be entered nunc pro tunc as of the day when said judgment was recorded.

23 And it is further ordered that the execution heretofore issued against the property of the defendant herein be, and the same is hereby, stayed and set aside.

(Signed) SAM'L BLATCHFORD.

U. S. circuit court for the southern district of N. Y.

JOHN W. COX, SUCCESSOR, &C., *vs.* HIRAM BARNEY. } N. S. 389.

It is hereby consented that an order be entered in this action to the effect that a certificate be entered herein that the money for which the judgment was recovered herein was exacted by the defendant, or was paid to him, and was by him paid into the Treasury, in the performance of his official duty as collector of the port of New York; and that he acted under the directions of the Secretary of the Treasury.

N. Y., Feb'y 9th, 1878.

ALMON W. GRISWOLD,
Pl'ff's' Att'y.
STEWART L. WOODFORD,
Def't's Att'y.

(Endorsed:) N. S. 389. U. S. circuit court, south. dist. of New York. John W. Cox, successor, &c., vs. Hiram Barney. Consent and order to enter certificate, &c. U. S. circuit court, Feb. 11, 1878. John I. Davenport, clerk.

24 UNITED STATES OF AMERICA, *ss:*

To John W. Cox, successor to and surviving partner of Victor Barsalew, and his attorney, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October, eighteen hundred and seventy-eight, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein Hiram Barney is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Dated July 25, 1878.

SAM'L BLATCHFORD.

(Indorsed:) U. S. Supreme Court. Hiram Barney, plaintiff in error, against John W Cox, successor to and surviving partner of Victor Barsalew, defendant in error. Citation. Stewart L. Woodford, att'y for pl'ff in error.

I hereby admit due service of a copy of the within.

ALMOND W. GRISWOLD,
Att'y for Def't in Error.

1878, JULY 26TH.

U. S. circuit court. Filed July 6, 1878. John I. Davenport, clerk.

(Indorsement on cover:) No. 1028. Hiram Barney, late collector, plaintiff in error, vs. John W. Cox, successor to & surviving partner of Victor Barsalew. S. New York C. C. U. S. Filed 2nd December, 1878.

REC. 1028—2